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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

ROBERT A. FARLEY, Superintendent, and
INDIANA ATTORNEY GENERAL,

Cross-Petitioners,

v.

ROBERT BASKIN,

Cross-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether alleged violations of the prophylactic rule of *Miranda v. Arizona*, 384 U.S. 694 (1966), are reviewable in a federal habeas corpus proceeding where the petitioner received a full and fair opportunity to litigate the *Miranda* claim in the state courts.

2. Whether the harmlessness of a *Miranda* error is measured in a federal habeas corpus proceeding by whether the error had substantial and injurious influence upon the jury's verdict, or by the "harmless beyond a reasonable doubt" standard used in direct appeals.

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Cross-petitioners Robert A. Farley, Superintendent,* and the Indiana Attorney General, pursuant to Rule 12.3 of the Rules of this Court, respectfully petition the Court for a writ of

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* Farley, present superintendent of the Indiana State Prison and Baskin's custodian, is automatically substituted for original respondent Richard Clark. U.S. Sup. Ct. R. 35.3.

certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in the case of *Robert Baskin v. Richard Clark, et al.*, 956 F.2d 142 (7th Cir. 1992). That decision affirmed the district court's denial of Baskin's petition for the writ of habeas corpus.

This cross-petition is expressly conditioned upon the granting of the petition for a writ of certiorari filed by petitioner Baskin seeking review of the same decision, which petition was docketed in this Court as *Baskin v. Clark*, No. 91-8127 (docketed May 4, 1992). The petition was received by counsel for the cross-petitioners on May 4, 1992.

OPINIONS BELOW

The decision of the Seventh Circuit affirming the denial of habeas corpus relief is reported at 956 F.2d 142, and is reproduced in the appendix to Baskin's petition in this Court. (No. 91-8127, Pet. App. C-1 *et seq.*)

The decision of the district court denying the writ of habeas corpus is not reported, and is reproduced in Baskin's appendix. (No. 91-8127, Pet. App. B-1 *et seq.*)

The decision of the Indiana Supreme Court affirming Baskin's conviction on direct appeal is reported at 546 N.E.2d 1191, and is reproduced in Baskin's appendix. (No. 91-8127, Pet. App. A-1 *et seq.*)

JURISDICTION

The judgment to be reviewed was entered on February 4, 1992. No petition to rehear the judgment was filed. Baskin's petition for a writ of certiorari to review the judgment was docketed in this Court on May 4, 1992.

Cross-petitioners expressly rely upon Rule 12.3 in filing this cross-petition, counsel having received Baskin's petition for a writ of certiorari in No. 91-8127 on May 4, 1992.

This Court has jurisdiction to review the judgment of the Seventh Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . ..

Subsection (a) of 28 U.S.C. § 2254 provides:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Trial and Direct Appeal

The basic facts of the burglary in this case were summarized by the Indiana Supreme Court as follows:

> The facts are these: On March 11, 1987, St. Joseph County police responded to a call that a "robbery" was in progress at 25190 Adams Road. Upon arriving at that location, police learned that the homeowner, Ronald Cholazynski, had exchanged gunfire with persons he believed had burglarized his home.
>
> Cholazynski stated that he arrived home to find a car sitting in his driveway with the motor running. As he approached the house, he heard voices inside and entered to find two persons inside his home. A chase ensued with the persons escaping by breaking a window. During this time, gunfire was exchanged between Cholazynski and the burglars.

> Cholazynski discovered that personal property had been stolen from his home, including his wedding band, which was later found on the person of appellant. The burglars' car had been blocked in the driveway by Cholazynski. Therefore, they were compelled to flee on foot. When police arrived, they pursued the burglars across a cornfield where they were captured. In addition to the victim's wedding ring found in appellant's pocket at his capture, the police also found a gun belonging to the victim near the scene of the capture. Following capture, appellant's *Miranda* rights were read to him, and upon arrival at the police station, he gave an incriminating statement.

Baskin v. State, 546 N.E.2d 1191, 1191-1192 (Ind. 1989).

The proof against Baskin was even stronger than the above summary indicates. Michael Anderson, who admitted that he was the other burglar, testified at trial that Baskin was his accomplice. (R. 170-173.) The victim identified Baskin in court as the burglar who had a nickel-plated pistol (R. 204, 208), which pistol had been stolen from the home (R. 213-214) and was found on the ground at the spot where Baskin was found trying to hide from police (R. 250, 252). When arrested, Baskin lied about his name, asked if "Jewell" was dead, and had a wrench and some bullets in his pockets. (R. 253-255, 262.)

Baskin had not one but two of the victim's rings in his pocket, the wedding ring and a class ring, which were found when his pockets were emptied at the police station about 30 minutes after his arrest. It was then that Baskin made the statement which is at issue in this case: Baskin said the wedding ring had been given to him and he had been wearing it for a month or so. (R. 267.)

At first the trial court excluded the ring statement for lack of clear evidence that Baskin had been read the *Miranda* warnings. Lt. Rutkowski, the officer to whom the statement was made, could not recall in jury-out testimony whether the warnings had been given prior to the statement, although he suggested that the statement may have been volunteered. (R. 127-137.)

Later in the trial, however, the arresting officer, Officer Cannoy, testified that after he arrested and handcuffed Baskin he read the *Miranda* warnings to him. He asked Baskin if he understood them, and Baskin replied that he did. In answer to Cannoy's questions Baskin lied that his name was "Robert Mason" and he was 19 years old. (R. 254-255.) Baskin was brought to the police station and his pockets emptied only a half-hour after the *Miranda* warnings were

given, and Baskin never indicated that he wished to remain silent or see an attorney. (R. 260-262.)

The State then asked to recall Lt. Rutkowski to testify about Baskin's ring statement. In light of Officer Cannoy's testimony that Baskin had heard and understood his *Miranda* rights, the trial court reversed its earlier ruling and allowed Rutkowski to testify. (R. 264-265.)

The jury convicted Baskin of burglary, and he received a sentence of 18 years. He appealed to the Indiana Supreme Court, challenging *inter alia* the introduction of the ring statement. The supreme court affirmed:

> The record in this case discloses that appellant was given the usual *Miranda* warnings upon his arrest. His incriminating statement followed such warning; thus the State fully discharged its duty of proving beyond a reasonable doubt that the statement was given freely and voluntarily as required under *Richardson v. State* (1985), Ind., 476 .E.2d 497.

Baskin, *supra*, 546 N.E.2d at 1192.

Federal Habeas Proceedings

Baskin next sought federal habeas corpus relief on the sole ground that admission of the ring statement into evidence violated *Miranda v. Arizona*, 384 U.S. 694 (1966). He has

never argued that the statement was involuntary, but instead that he was not shown to have knowingly and intelligently waived his *Miranda* rights. The State argued in response that (1) *Miranda* violations are not cognizable in a federal habeas proceeding; (2) the state courts' finding of a valid waiver of Baskin's *Miranda* rights was a presumptively correct factual finding supported by the record; and (3) any error in admitting the ring statement was harmless.

The district court denied the writ of habeas corpus, reviewing the "voluntariness" of Baskin's statement *de novo*. The court found the cognizability argument "very appealing" but beyond its authority, and found it unnecessary to address harmless error. (No. 91-8127, Pet. App. B-5 - B-6.)

Baskin appealed to the Seventh Circuit, which affirmed the denial of habeas relief. The State argued again that *Miranda* violations should be treated the same as Fourth Amendment violations under *Stone v. Powell*, 428 U.S. 465 (1976), but the court made no mention of this argument. Instead, it found on the merits that the state courts' findings were factual conclusions entitled to a presumption of correctness under 28 U.S.C. § 2254(d), and were fairly supported by the record. 956 F.2d at 144-146.

The court of appeals also found that any error was harmless beyond a reasonable doubt. The court declined the State's invitation to measure harmlessness by whether it had substantial influence on the jury's verdict, since the State could "meet its burden in this case even under the stricter harmless error standard . . .." 956 F.2d at 146 n. 3.

REASONS FOR GRANTING THE WRIT

Baskin has now petitioned this Court for certiorari on the merits of his *Miranda* waiver claim, arguing that the state court findings were improperly accorded a presumption of correctness. (No. 91-8127, Pet. at i, 5-9.) Should Baskin's petition be granted, review of the Seventh Circuit's decision should include the two other issues raised by Indiana throughout this case and pretermitted by the Seventh Circuit.

At the outset, it must be stressed that Baskin has never challenged the voluntariness of his statement, and has never claimed coercion or pressure of any sort. Instead, this case is limited to his claim that the prosecution failed to show that he knowingly and intelligently waived his *Miranda* rights before making the ring statement.

I. THE REVIEWABILITY OF *MIRANDA* CLAIMS IN FEDERAL HABEAS CORPUS PROCEEDINGS IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

In *Stone v. Powell*, 428 U.S. 465 (1976), this Court held that an alleged violation of the judicially-created Fourth Amendment exclusionary rule cannot be a ground for federal habeas relief where the petitioner has been given a full and fair opportunity to litigate the claim. 428 U.S. at 494. The Court found that the diminished effectiveness of applying the exclusionary rule on collateral review is outweighed by the costs of the rule to the criminal judicial system. *Id.* at 489-495.

Certiorari has been granted in another case raising the same question. *Withrow v. Williams*, No. 91-1030, *cert. granted* ___ U.S. ___, 112 S.Ct. 1664, 60 U.S.L.W. 3708 (April 20, 1992) (Question 2). Two Justices have previously opined that they would extend *Stone*'s holding to *Miranda* claims. *Duckworth v. Eagan*, 492 U.S. 195, 205-214 (1989) (O'Connor, J. joined by Scalia, J. concurring).

Since *Stone* the Court has continued to recognize the limited role of federal collateral review of state convictions,

emphasizing the costs which habeas corpus exacts on federalism and important state interests in finality of its criminal judgments. *See, e.g., McCleskey v. Zant*, 499 U.S. ___, 111 S.Ct. 1454, 1468-1470, 113 L.Ed.2d 517 (1991); *Teague v. Lane*, 489 U.S. 288, 305-310 (1989) (plurality); *Rose v. Lundy*, 455 U.S. 509, 518 (1982).

Because the cognizability of *Miranda* waiver claims in federal habeas corpus proceedings is an important federal issue that should be decided by this Court, U.S. Sup. Ct. R. 10.1(c), the issue should be included in the Court's review of the decision below should Baskin's certiorari petition be granted.

II. THE PROPER STANDARD OF HARMLESS ERROR IN A FEDERAL HABEAS PROCEEDING IS AN IMPORTANT ISSUE OF FEDERAL LAW.

This Court has not directly addressed the question of harmless error as applied to prophylactic rules reviewed in federal habeas corpus proceedings. The "harmless beyond a reasonable doubt" standard was announced and has been used in direct appeal cases, *e.g. Chapman v. California*, 386 U.S. 18 (1967); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); and in

habeas cases involving fundamental constitutional rights, *Yates v. Evatt*, ___ U.S. ___, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991) (burden-shifting presumption in jury instructions); *Rose v. Clark*, 478 U.S. 570 (1986) (same).

This Court has, however, consistently recognized the limited office of the writ, noting that it lies only to correct "a fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure." *United States v. Timmreck*, 441 U.S. 780, 783 (1979), quoting *Hill v. United States*, 368 U.S. 424, 428 (1962). A habeas proceeding does not serve as a direct appeal. *United States v. Frady*, 456 U.S. 152, 165 (1982).

Thus in reviewing jury instructions in a habeas proceeding, for example, the Court has applied the following standard:

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,"

> *Cupp v. Naughten*, 414 U.S. [141], at 147 [1973],not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,'" *id.*, at 146.

Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

Individual Justices have also noted the importance of distinguishing between the standard of review of *Miranda*-related issues on direct appeal and in a collateral proceeding. *Duckworth v. Eagan*, *supra* (O'Connor, J. concurring); *Greer v. Miller*, 483 U.S. 756, 768-769 (1987) (Stevens, J. concurring).

Based on similar reasoning and the prophylactic, non-fundamental nature of the *Miranda* exclusionary rule, the Seventh Circuit has held that harmlessness is measured by whether the *Miranda* error had substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 944 F.2d 1363 (7th Cir. 1991), *cert. pending* No. 91-7358 (pet. filed 2/18/92). Brecht, represented by the same appointed counsel who represents Baskin here, has argued in this Court that the issue is an important question, and that there is a conflict among the circuits on the standard. (No. 91-7358, Pet. at 7-21.)

For the same reasons, any grant of certiorari to review Baskin's case should also include review of the harmless error standard to be applied in such cases.

CONCLUSION

Should the Court grant Baskin's petition for a writ of certiorari in No. 91-8127, this cross-petition for a writ of certiorari should also be granted.

Respectfully submitted,

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June 3, 1992